

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

117577

FILE: B-206857

DATE: September 29, 1982

MATTER OF: American Photographic Industries, Inc.

DIGEST:

Notwithstanding agency's claim that the protester never extended its bid acceptance period, the record shows that the protester informed the contracting officer in writing that it would extend its bid upon request to do so from the contracting officer. Furthermore, the protester's conduct in obtaining from its bank an additional 10-day extension of its \$40,000 letter of credit shows that the protester intended to extend its bid. Protest is sustained.

American Photographic Industries, Inc. (American), a small business, protests the rejection of its bid for the management and operation of the base audiovisual center under invitation for bids (IFB) F22608-82-B0002 issued by Columbus Air Force Base, Mississippi.

American contends that the Air Force improperly awarded the contract to the second low bidder despite the fact that American made every effort to cooperate with the contracting office at Columbus Air Force Base in order to obtain the award. In addition, American requests that it be reimbursed for the costs of preparing its bid because of the alleged arbitrary and capricious action by the Air Force in handling its bid.

For the reasons set forth below, we sustain the protest.

Five bids were received on the IFB with American being the apparent low bidder. The contracting office contacted the Defense Contract Administration Services Management Area (DCASMA) and requested that a financial preaward survey be performed on American. DCASMA's initial report recommended against award to American but, after receiving additional financial information from American several weeks later, DCASMA reversed itself and recommended award to American. However, despite the change by DCASMA to a favorable recommendation, the contracting officer at Columbus Air Force Base was still concerned about American's financial

status. Consequently, DCASMA was asked to verify some of the company's financial data to establish whether American was, in fact, financially stable.

Because of the delay in ascertaining American's financial status, the company was asked on several occasions to extend its bid acceptance period for an additional 30 days. The Air Force claims that American made no verbal or written response to the requests for extension. The contracting officer subsequently notified American in writing after the expiration of the original 60-day bid acceptance period that American's bid was being rejected as nonresponsive for failure to extend the bid acceptance period and that an award was being made to the second low bidder. Following receipt of this notification, American filed a timely protest with our Office.

The Air Force asserts that the award to the second low bidder was proper in view of the fact that American refused to extend its bid despite several attempts by the agency to obtain an extension. Further, the Air Force argues that even if it had not requested an extension from American, our decisions indicate that a bidder which has a continuing interest in being considered for award has an obligation to check with the contracting officer before its bid expires. See 42 Comp. Gen. 604 (1963). Finally, the Air Force questions whether American is an interested party under our Bid Protest Procedures entitled to maintain a protest with our Office. See 4 C.F.R. § 21.1(a) (1982). The Air Force cites our cases which hold that by not extending the bid acceptance period, a low bidder loses standing to protest a subsequent award to the second low bidder. See Duraclean by Simpson, B-202133, April 15, 1981, 81-1 CPD 290.

We disagree with the Air Force's assertion that American refused to extend its bid. The record shows that the IFB required a 60-day acceptance period after bid opening, which period expired on February 16, 1982. On January 22 and 23, 1981, the contracting office at Columbus Air Force Base verbally requested American to extend its bid because of the delay in obtaining the preaward survey from DCASMA. This was followed up by an extension request letter dated February 5, 1982, which American apparently never received. Another extension request letter was sent on February 12, 1982, and in a telephone conversation with the contracting office on February 18, 1982, the president of

American acknowledged that this letter was received on February 17, 1982. Nevertheless, the Air Force's report on this protest shows that the president of American did write the contracting office a letter, dated February 17, 1982, which, in part, stated the following:

"* * * concerning item 3 of your letter, I have thoroughly checked all correspondence and tapes of phone conversations and find nothing for the 22 and 23 of January, however, I did initiate a conversation with you on January 25th at which time you stated that no decision had been made, but if the decision was made to extend [the current contract] for 30 days, would I be able to extend my bid acceptance. I stated I would and that anything you needed to send in writing and I would be glad to comply. From January 25th to receipt of your 12 Feb correspondence on Feb 17th, I have received nothing from you * * *."

Further, the record shows that on February 18, 1982, and again on February 24, 1982, the contracting office verbally informed American that it needed an extension of the company's bid acceptance period. In a contemporaneous handwritten memo of the conversation by the Chief, Base Contracts Office, it is noted: "He [president of American] is getting an extension to the bank ltr of credit eff. 18 Feb. 82 and will extend his bid acceptance period, also." It is our opinion that the February 17, 1982, letter and the February 18, 1982, conversation constituted an extension of American's bid acceptance period.

Furthermore, the intention of a bidder to extend the life of its bid can be inferred from the bidder's conduct. See Surplus Tire Sales, 53 Comp. Gen. 757 (1974), 74-1 CPD 161. Here, American furnished as its guarantee of performance an irrevocable letter of credit from a bank in the amount of \$40,000. The letter of credit, after two amendments obtained by American in December 1981, was to expire on February 18, 1982. At the request of the contracting office at Columbus Air Force Base, American, on February 19,

1982, obtained a further extension of the expiration date of the letter of credit until February 28, 1982. We feel this conduct by American in obtaining the extension of its letter of credit to February 28, 1982, also signified an intention to extend the company's bid acceptance to the same date. In this regard, we note that the Air Force admits that the letter of credit extension could be considered tantamount to a bid acceptance extension.

The Air Force argues that, in any event, the bid expired on February 28, 1982, as no extension was made. As to the extension of American's bid acceptance period beyond February 28, 1982, we find that under the circumstances of this procurement, any request by the Air Force for an extension of American's bid beyond this date was unreasonable. The record shows that on February 1, 1982, the contracting office at Columbus Air Force Base received DCASMA's changed recommendation that award be made to American. The record further shows that on the same date and again on February 5, 1982, the contracting office requested that DCASMA verify certain financial data on the personal guaranty agreement submitted by American's president. Both times DCASMA informed the contracting office that there was nothing further to check out and that if the contracting office wanted to verify the data, the burden was on the contracting office to do it. DCASMA again reemphasized this position in a letter dated February 25, 1982, which responded to the contracting office's February 19, 1982, letter formally requesting that the financial data be verified.

As to the expiration of American's letter of credit on February 28, 1982, we have held that the expiration of a bidder's bid bond period does not preclude the contracting activity from considering and/or accepting the bid. See Niedermeyer-Martin Co., 59 Comp. Gen. 73 (1979), 79-2 CPD 314; Engle Acoustic & Tile, Inc., B-190467, January 27, 1978, 78-1 CPD 72. While we have stated that the failure of a bidder to execute a bid bond effective for the entire bid acceptance period renders the bidder's bid nonresponsive, we have distinguished the situation where, as here, the invitation did not require that the bidders obtain an extension of the original bid bond or furnish an additional bond in the event the acceptance period was extended beyond the date fixed by the terms of the invitation. Engle Acoustic & Tile, Inc., *supra*. This is because we do not have a failure to comply with a material requirement of the invitation nor the waiver of a material requirement of the invitation to the prejudice of other bidders.

Furthermore, we feel that under the circumstances the contracting office at Columbus Air Force Base could have made a responsibility determination prior to the February 28, 1982, expiration of American's letter of credit. This is reinforced by the fact that in a letter dated March 9, 1982, responding to a final written request by the contracting office, DCASMA pointed out that while its award recommendation would stand, the recommendation could be overridden by the contracting office. We are concerned about the delay of the contracting office at Columbus Air Force Base in making a responsibility determination on American because had American been found to be non-responsible, the contracting office was required by the Small Business Act to refer the matter to the Small Business Administration (SBA), which conclusively determines the matter by issuing or refusing to issue a certificate of competency (COC), 15 U.S.C. § 637(b)(7)(A) (1976). See Prestype, Inc., B-194328, August 17, 1979, 79-2 CPD 127. Moreover, Defense Acquisition Regulation § 1-705.4(c) (1976 ed.) requires that award be withheld until SBA action concerning the issuance of a COC or until 15 working days after the SBA is notified of the request for a COC, whichever is earlier. The granting of an extension beyond the 15-day period for filing or processing a COC application is a matter within the discretion of the contracting agency. Greenbrier Industries, Inc., B-191380, April 24, 1978, 78-1 CPD 315.

The protest is sustained.

The performance period on the awarded contract was from April 1 through September 30, 1982. Since this period is nearly over, we recommend that a responsibility determination of American be made by the contracting officer or the SBA, if necessary, and, if affirmative, that the contract awarded to the second low bidder be terminated and the contract be awarded to American for the first year option. Ponafax Corporation, Reconsideration, B-201176.2, September 16, 1981, 81-2 CPD 220.

Based on the above, it is unnecessary to consider American's claim for bid preparation costs. Ponafax Corporation, B-201176, June 22, 1981, 81-1 CPD 515.

Larry R. Chan C. Lane
Comptroller General
of the United States